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IN THE

Supreme Court of the United States

October Term, 1942.

No. [redacted] 56

THE ATLANTIC REFINING COMPANY, Owner of the Tank Steamship "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, Claimant of the Motor Vessel "LAURA MAERSK".

Petitioner's Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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TABLE OF CONTENTS OF REPLY BRIEF.

	Page
I. The Position of the "Bohemian Club"	1
II. The Question Presented Is One of Law and Not One of Fact	5
III. The Danger of Fouling the Buoy 2-D Was Real	9

TABLE OF CASES CITED.

	Page
A. P. Skidmore, The (C. C. A. 2), 115 Fed. 791	10
Battler, The (C. C. A. 3), 72 Fed. 537, cert. denied, 163 U. S. 697	10
Caldy, The (C. D., D. Md.), 123 Fed. 802, affirmed (C. C. A. 4), 153 Fed. 837	8
Clarence L. Blakeslee, The (C. C. A. 2), 243 Fed. 365	10
Garden City, The (C. C. A. 6), 127 Fed. 298	10
Socony No. 9, The (C. C. A. 2), 74 Fed. (2d) 233	10
Victory, The, 168 U. S. 410	4

TABLE OF STATUTES CITED.

	Page
Act of March 3, 1899 (c. 425, sec. 15, 30 Stat. 1152), U. S. C. Title 33, sec. 409	6, 7, 8
Inland Rules of Navigation, Article 25, 30 Stat. 101, U. S. C. Title 33, sec. 210	4

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No. 975. October Term, 1942.

THE ATLANTIC REFINING COMPANY, OWNER OF THE TANK STEAMSHIP "BOHEMIAN CLUB",

Petitioner,

v.

A. P. MOLLER, CLAIMANT OF THE MOTOR VESSEL "LAURA MAERSK."

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The facts in this case as found by the District Court were accepted by the Circuit Court of Appeals, and are not disputed; but the question presented, which is solely one of law, i. e. whether the master of the "BOHEMIAN CLUB" had been guilty of a "statutory fault"—a violation of the provisions of the Act of March 3, 1899, has been obscured by misstatements of material facts, in the respondent's brief, to which we therefore deem it necessary respectfully to direct the attention of your Honorable Court.

I.

The Position of the "Bohemian Club."

On page 4 of its brief, the respondent says (italics supplied):

> "The District Court held that under the circumstances of the case, the 'BOHEMIAN CLUB' was justified in moving from *a safe anchored position at the edge of the channel* to her position where the collision occurred (Conclusion 2; R. 112)."

The extent to which the respondent has thus misstated the conclusion of the District Court will appear by a reference to the Record; Conclusions of Law No. 2; R. p. 112, which reads as follows:

> "2. Those in charge of the 'BOHEMIAN CLUB' were justified in moving her shortly after 10 A. M. when the fog cleared, and in anchoring her again at 10.18 when the fog again obscured indicia of position."

The respondent, again, by repeatedly asserting in its brief that the "BOHEMIAN CLUB" was anchored at 7.41 A. M. *"on the edge of the channel line"—"immediately along the edge of the channel"—"on the edge of the navigable channel"*—has sought to give emphasis to an assertion *which was not a finding* made by either the District Court or by any of the Judges in the Circuit Court of Appeals.

The facts as found by the Trial Judge (Findings of Fact Nos. 3, 9, 10, 11, 12, 20, 21 and 40; R. pp. 103 and 104), and by the Circuit Court of Appeals (Opinion: R. pp. 116 and 117), relating to the position of the "BOHEMIAN CLUB" both before she endeavored to move away from the Buoy 2-D and at the time of the collision were the following:

> The "BOHEMIAN CLUB" was 435 feet long; shortly after 10 A. M. the Buoy 2-D first became visible, and when sighted lay about 150 feet distant, at an angle of about 45 degrees off the starboard bow; at that time

the heading of the "BOHEMIAN CLUB" was approximately 30 degrees; the distance between the Bulkhead Bar Range line and the easterly boundary of the channel on which Buoy 2-D is located is about 400 feet; the distance between the Bulkhead Bar Range line and the westerly boundary of the channel is about 800 feet; the Deepwater Point Range line extends at approximately a 34 degree angle to the Bulkhead Bar Range line, the two ranges meeting at the Buoy 2-D; at 11.35 A. M. the "BOHEMIAN CLUB" was located in the channel with her bow approximately on the Bulkhead Bar Range line near its juncture with the Deepwater Point Range line, her stern tailing on or to the westward thereof, and her heading being 26 to 30 degrees. The collision occurred at about 11.37 A. M.

The course up the Bulkhead Bar Range was 9 degrees (R. p. 17a).

To assist your Honorable Court in visualizing the foregoing findings, which definitely fixed the position of the "BOHEMIAN CLUB" within the channel limits (a) immediately before lifting her anchor preparatory to moving away from the Buoy 2-D, and (b) at the time of the collision, we have transcribed on the drawing hereto attached the findings made by the Courts below, which show the "BOHEMIAN CLUB", in the position "A", before moving away from the buoy, not "on the edge of the channel line", or "immediately along the edge of the channel", but lying diagonally athwart the channel on the easterly side of the range line, 400 feet wide, headed on 30 degrees, with the Buoy 2-D, 150 feet distant, and at an angle of about 45 degrees off the "BOHEMIAN CLUB'S" starboard bow. It also shows the

"BOHEMIAN CLUB", in the position "B", at the time of the collision, headed on 30 degrees, with her bow on the range line, and her stern tailing to the westward. The scale of the drawing is 200 feet to the inch.

It is a fact, therefore, that at the time of the collision the bow of the "BOHEMIAN CLUB" was on the range line, with her stern tailing to the westward; whereas before she was moved she was canted across the channel on the easterly side of the range line, as stated on page 21 of the brief in support of our petition. The respondent has quoted that statement at the bottom of page 8 of its brief, and, contrary to the established facts in the case as found by both the Courts below, has asserted that "there is no justification whatever for such a statement either by counsel or by the dissenting Judge," and that it is an assumption which "was not accepted by the majority."

It is thus apparent that the "BOHEMIAN CLUB", while lying diagonally athwart the easterly side of the channel, was as much, if not more, of an obstruction to vessels proceeding *up stream*, and therefore obligated to keep to their starboard, or to *the easterly*, side of the channel, than she subsequently was, when on the range line, to vessels proceeding *down stream* and obligated to keep to their starboard, or to *the westerly*, side of the channel.

Article 25 of the Inland Rules of Navigation, quoted on page 22 of the brief in support of our petition, makes it mandatory, when it is safe and practical to do so, for vessels to keep to that side of the fairway or midchannel which lies on their starboard side.

In *The Victory*, 168 U. S. 410; 42 L. Ed. 519, which involved a collision between two vessels approaching each other from opposite directions, this Court held:

"Each of these vessels was entitled to presume that the other would act lawfully; would keep to her own side; * * * The rule applicable to them was that each should keep to her own starboard side of the channel."

II.

The Question Presented Is One of Law and Not One of Fact.

The majority of the Court below *did not find* that the possibility of fouling the buoy *did not exist;* they *did not find* that it was a *culpable fault* for the master of the "Bohemian Club" to endeavor to move his vessel away from the buoy; they did hold (R. p. 121) that the necessity for again anchoring, because of the density of the redescending fog, and which the majority held caused the master of the "Bohemian Club" "to violate a statutory rule", was a circumstance for which there was no "legal justification", since "merely to avoid the possibility of fouling the buoy, when his vessel would swing round on the turn of the tide, he lifted anchor and manoeuvred his boat in weather so unsettled that within five minutes after lifting anchor and when because of the density of the redescending fog, he no longer knew where he was, he found it necessary again to drop anchor." The majority, accordingly, held (R. p. 121) that the "Bohemian Club's" "*particular fault*" was an "*unjustifiable violation of a statute.*"

The necessity for anchoring was thus recognized; but it was a necessity for which the majority held there was no "legal justification", since it resulted from a manoeuvre which was "deliberately" made by the master of the "Bohemian Club" "merely to avoid the possibility of fouling the buoy."

Obviously, a manoeuvre made by a master of a vessel to avoid the possibility of fouling a buoy, *is not negligence:*

on the contrary, it is *an act of prudence.* The trial Judge held that the decision made by the master of the "Bohemian Club" was a "reasonable" one (R. p. 109); the learned dissenting Judge of the Circuit Court of Appeals said (R. p. 123) that in moving his vessel "to avoid the buoy he acted prudently. He took his vessel out of a position of positive danger while he could do so"; and there was no evidence to support a finding that the master's decision was one which nautical experience and good seamanship would condemn as unjustifiable *at the time and under the circumstances shown.*

The weather was unsettled, and therefore the master of the "Bohemian Club" had no means of knowing how long he might be compelled to remain at anchor before being able to proceed ahead. If, therefore, it was proper for him to move away from the buoy to avoid the possibility of fouling it with the change in tide, then, clearly, it was proper, if not indeed incumbent upon him, to make that manoeuvre so soon as the opportunity for doing so presented itself.

The question presented, as stated on page 5 of our petition is, therefore, whether the provisions of the Act of Congress approved March 3, 1899, are so rigorous and inexorable that a navigator who is compelled to anchor his vessel, because of fog, in the navigable channel of a river, and who, upon ascertaining during a temporary lift in the fog that his position is one of danger, inaugurates a manoeuvre to place his vessel in a position of greater safety, but who, before completing his manoeuvre, is again compelled to anchor because of a sudden redescent of the fog which blots out all indicia of position, and who thereupon anchors his vessel in a position where, unknown to

himself at the time, she obstructs the passage of other vessels on that side of the channel in which she is anchored, is, under these facts, guilty of a violation of the Act of March 3, 1899; and the determination of that question, necessarily, involves a consideration of the following:

1. Is a navigator whose vessel is anchored within the channel limits of a navigable river in a position which he regards as one of danger to himself, guilty of a culpable fault for endeavoring to move her to a position of greater safety?

2. Will he have violated the provisions of the Act of March 3, 1899, if, before completing his manoeuvre, he is again compelled to anchor, because of a sudden redescent of fog which blots out all indicia of position, at a point where he obstructs the passage of vessels proceeding *down stream.*

3. Must he be more solicitous over the possibility that a vessel may be approaching through the fog at an unlawful rate of speed, as did the "LAURA MAERSK", than for the safety of his own vessel?

4. If he is justified in anchoring, because of fog, on the *easterly* side of a channel, where he obstructs the passage of vessels proceeding *up stream*, is it material, in determining whether he has violated the Act of March 3, 1899, that where he is subsequently compelled to anchor he obstructs the passage of vessels proceeding *down stream?*

In resolving these questions against the master of the "BOHEMIAN CLUB", it is our contention that the majority of the Circuit Court of Appeals, as the learned dissenting Judge of that Court said in his opinion sur rehearing (R.

p. 132 et seq.), announced a rule of navigation which is a "very novel rule"; a rule which "misinterprets the Act of March 3, 1899"; and a rule which "renders navigation more difficult, for a vessel once anchored because of fog must remain at its first anchorage even if it be in a dangerous position until the fog has lifted, not momentarily, but completely."

We respectfully submit that the rule of navigation announced by the majority of the Circuit Court of Appeals:—

1. Is a "very novel rule", because, contrary to the fundamental consideration underlying all rules of navigation, it penalizes a navigator for inaugurating a measure of prudence when confronted with a situation which he regards as one of danger to his vessel, and is unsupported by any authority.

2. It misinterprets the Act of March 3, 1899, in that the Act is in aid of commerce and navigation, and therefore, as was said by the District Court in THE CALDY, 123 Fed. 802, (D. of Md.) affirmed 153 Fed. 837, (C. C. A. 4) "should receive a sensible construction to further that end."

3. It renders navigation more difficult in that it places a navigator in a dilemma when confronted with a situation similar to that in the instant case, and thereby induces hesitation, doubt and indecision which are so frequently the primary causes for marine disasters.

For these several reasons, we therefore respectfully submit that the Act of March 3, 1899, should be interpreted by your Honorable Court in the public interests, and as a matter of paramount importance to all navigators.

III.

The Danger of Fouling the Buoy 2-D Was Real.

The respondent states, on page 5 of its brief, that "the record is replete with testimony showing clearly that the alleged danger (i. e. of fouling the Buoy 2-D) was fancied rather than real;" but the argument submitted to support that conclusion is not in accord with the facts. The facts were these:—

When the "BOHEMIAN CLUB" anchored at 7.41 A. M. her heading was 9 degrees (R. p. 10a) and the tide was flood (R. p. 42a). The tide did not change to ebb at 9.10 A. M., as the respondent asserts, but, as the Record shows (R. p. 98), it had "finally settled down to ebb", at 9.10 A. M. During the interval from 7.41 A. M. to 9.10 A. M. the "BOHEMIAN CLUB" had swung with the incoming flood tide through an arc of 110 degrees (R. p. 43a), but by 9.10 A. M. when the tide had "finally settled down to ebb" she had swung back again and had steadied on a heading of 30 degrees (R. p. 43a). She did not foul the buoy, while swinging *for but a short interval of time* with the flood tide, because, as the testimony further shows (R. p. 48a), the change in the tide from flood to ebb is "a very gradual change",—"the force in the flood tide will gradually diminish and you will have a period of slack water"—"when there is no tide at all."

With respect to the respondent's assertion (page 6 of its brief) that the master of the "BOHEMIAN CLUB" endeavored to move away from the buoy at a time when the ebb tide had a minimum of two hours to run before a change took place", we respectfully direct attention to the fact that at 9.46 P. M. on the night preceding the date of the collision until 4.58 A. M. on the day of the collision, a period of approximately 7 hours, the "BOHEMIAN CLUB"

had been obliged to anchor on the Liston Range of the Delaware River because of fog (R. pp. 9a and 10a). Manifestly, the master of the "BOHEMIAN CLUB" had no means of knowing how long he might be obliged to remain at anchor after he first saw the Buoy 2-D off his starboard bow; and if it was proper, as we contend, for him to endeavor to move away from the buoy at all, then, necessarily, it was incumbent upon him to act so soon as an opportunity for doing so presented itself.

In a situation such as that presented in the instant case, which involved (a) the possibility of fouling the buoy, and (b) the measures to be inaugurated to avert that danger, the law is well settled that the judgment of an experienced navigator should not be condemned unless it is one which nautical experience and good seamanship would condemn as unjustifiable, not in the light of after events, but at the time and under the circumstances shown, and that every doubt must be resolved in his favor.

The Clarence L. Blakeslee (C. C. A. 2, 243 Fed. 365;
The A. P. Skidmore (C. C. A. 2), 115 Fed. 791;
The Socony No. 9 (C. C. A. 2), 74 Fed. (2d) 233;
The Battler (C. C. A. 3), 72 Fed. 537, cert. denied, 163 U. S. 697;
The Garden City (C. C. A. 6), 127 Fed. 298.

Respectfully submitted,

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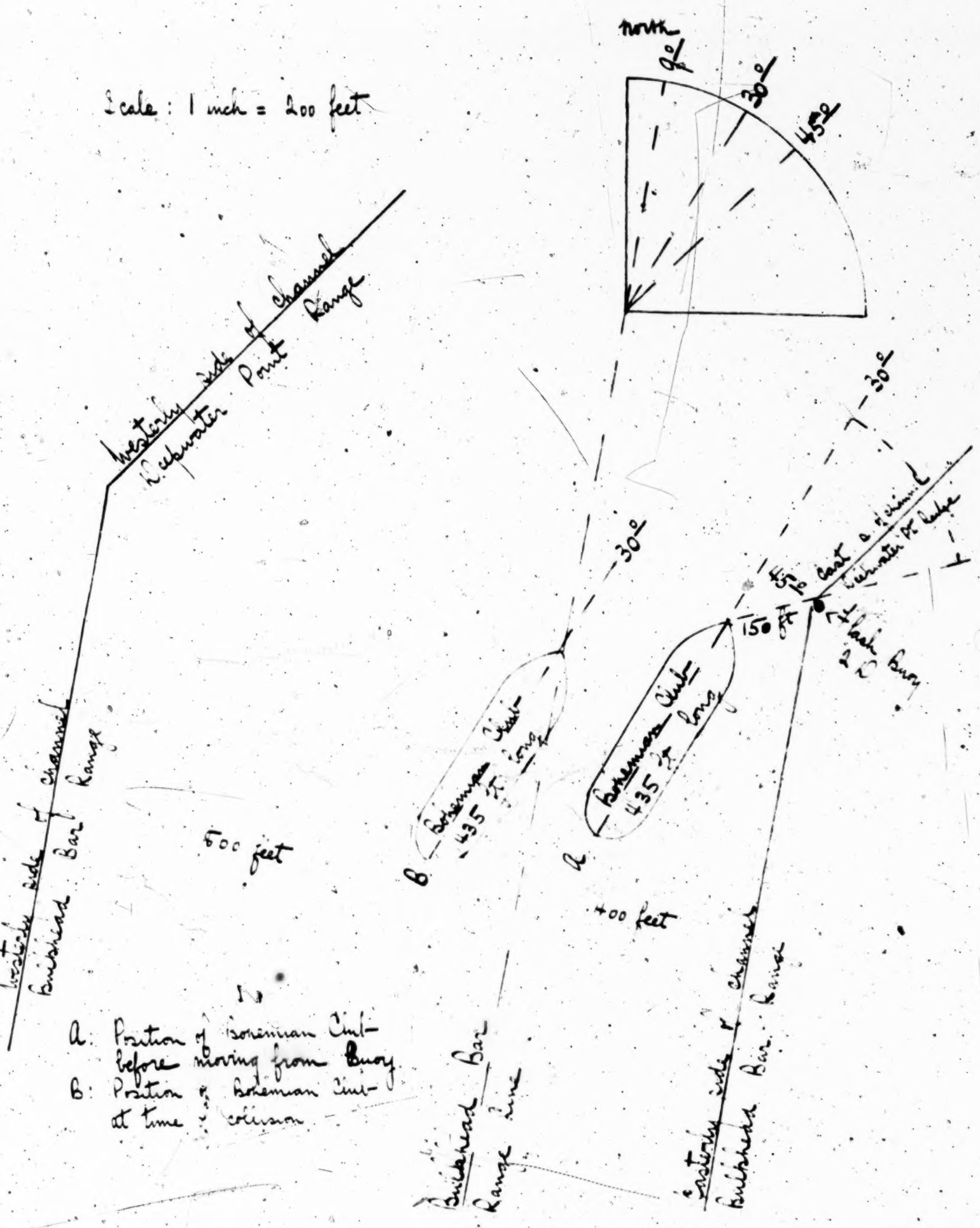

A: Position of Bohemian Club before moving from Buoy
B: Position of Bohemian Club at time of collision